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ARIZONA CORPORATION COMMISSION

December 17, 2003

John G. Gliege  
P. O. Box 1388  
Flagstaff, AZ 86002-1388

Arizona Corporation Commission

DOCKETED

DEC 17 2003

Re: Pine Water Company  
Docket No. W-03512A-03-0279

DOCKETED BY	
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Dear Mr. Gliege:

I have received your letter dated December 9, 2003, as well as the attached e-mail thread. As Mr. Shapiro advised you in one of the e-mails, he had previously advised me that this situation existed and that he had recommended that you contact me if you had continuing concerns in this regard. As I understand the situation, you are concerned about what you describe as the impact upon the proceeding of what you portray as the "apparent personal relationship" between Patrick Black and Assistant Chief Administrative Law Judge Dwight Nodes. The basis upon which you derive a concern is that Mr. Black and Judge Nodes spoke freely and in a very informal manner, which you found to immediately raise questions as to the propriety of the Administrative Law Judge continuing in the proceeding. And, if I understand the context in which this issue is presented, despite your immediate concern, you said nothing over the course of the conversation, choosing instead to raise the matter with Mr. Shapiro by e-mail.

Your inquiry indicates that you have concerns about the integrity of the hearing process, indicating that, based on your review of the judicial canons of ethics, you believe that an issue exists which creates an appearance that could have an impact on how the fairness of the Commission's processes are perceived. Finally, you inquire as to whether there is a process in place at the Commission "regarding the protection of the integrity of the hearing system".

I must admit that I am mystified by this sequence of events. I will respond more directly to your requests, but it seems to me that if you found the exchange between Mr. Black and Judge Nodes so disturbing, the better practice would have been to inquire into the nature of their relationship immediately. I am confident that the matter would have been laid to rest at that time and you could have avoided a contentious exchange of e-mail with Mr. Shapiro, as well as this exchange of letters. Because your inquiry to me has broadened the scope of this matter beyond just a discussion between yourself and Mr. Shapiro, I feel compelled to docket both your letter

John G. Gliege  
December 17, 2003  
Page Two

and my response. It is my view that Judge Nodes should have the opportunity to address the implications implicit in your concerns.

But let me address your inquiry more directly. First, as far as I know Patrick Black and Dwight Nodes do not have a personal relationship. Yes, Mr. Black was employed at the Commission as an attorney in the Legal Division and subsequently as the Policy Advisor to Commissioner Irvin. However, in my judgment being employed in the same State Agency does not create a personal relationship between two individuals. During his tenure in the Legal Division, Mr. Black represented Commission Staff in proceedings before our Hearing Division. Subsequently, during his tenure as Commissioner Irvin's Policy Advisor, Mr. Black would have interacted routinely with Judge Nodes as regards matters heard by Judge Nodes. I have no reason to believe that Mr. Black and Judge Nodes had a social relationship outside the workplace.

Of course, even if they had had a personal relationship, there is no reason to believe that the fact of that relationship would cause Judge Nodes to have a personal bias or prejudice that would impact this matter. Your letter appears to indicate that you have reviewed the Arizona Code of Judicial Conduct (Judicial Code) in deciding whether to raise this issue. I would like to point out the Commentary to Canon 3E (1) (b), which points out that judges ordinarily discontinue recusal on grounds of prior associations with a firm within one to five years after their appointment to the bench. The Commentary also notes that a lawyer in a government agency doesn't ordinarily have an association with other lawyers employed by the agency for purposes of this Canon, in any event.

I have reviewed the Judicial Code and, based on the information you have provided, I don't see any reason why Judge Nodes would be required to recuse himself from this matter. Of course, the portion of the Judicial Code addressing its Application is explicit that the Judicial Code is not applicable to administrative law judges or administrative hearing officers in this state, unless expressly adopted by statute or by agency rules. I do not believe that the Judicial Code is applicable in this instance. Of course, I see no reason to believe that it would have been violated if it did apply.

Your inquiry questions whether a procedure is in place in Commission proceedings to protect the integrity of the hearing system in situations where former employees appear before the Commission. The answer to this question is, yes, a procedure is in place. The procedure that is in place is the enactment into law of A.R.S. § 38-504. The statute provides that a former state employee may not represent another person for compensation before his former agency for a one year period on any matter in which the individual was directly concerned and on which the individual personally participated by a substantial and material exercise of administrative discretion. In fact, as Mr. Shapiro alluded during your e-mail exchange, the Commission and its

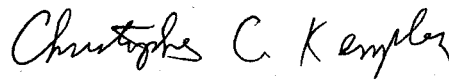
John G. Gliege  
December 17, 2003  
Page Three

former employees have exercised a somewhat more stringent practice than is mandated. Former Commission employees routinely wait a full year before appearing in front of the Commission on any matter. This was the case with Mr. Black.

Finally, I am compelled to comment on the nature of Commission proceedings as a general matter. While I am not certain, I believe that I have seen your name associated with Commission proceedings in the past. In any event, you should be aware that Commission proceedings are administrative proceedings, which proceed in a less formal manner than judicial proceedings. In addition, as Mr. Shapiro indicated in his e-mail, the Utility Bar is a fairly small group of lawyers who interact with each other and the Commission on a frequent basis. As a result, on occasion the formality with which parties address each other as well as our Administrative Law Judges is less than you would routinely see in Superior Court. It was my experience when I practiced in Navajo County some 20 years ago, that a rural county bar had some similar characteristics. I would have imagined that Coconino County was similar. Nevertheless, the informality does not mean that matters are taken less seriously, and certainly does not imply that Judges are not impartial arbiters.

In conclusion, it doesn't appear that anything has happened in this matter which would reasonably result in concerns about the integrity and fairness of the Commission's processes, or any of the participants. I am reasonably certain that no violation of either Arizona law or the Code of Judicial Conduct has occurred by the events of which you are suspicious. The Commission processes are certainly adequate to address any concern that might result from attorneys leaving our employ and subsequently representing clients in proceedings here. If you have any questions, please feel free to contact me at (602) 542-6025.

Sincerely,



Christopher C. Kempley  
Chief Counsel

CCK:nrr

cc: Docket Control/w Attachment, Original and 13 copies  
Jay L. Shapiro  
Patrick J. Black  
Dwight Nodes

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DEC 12 2003

LAW OFFICE OF

JOHN G. GLIEGE

LEGAL DIV.  
ARIZ. CORPORATION COMMISSION

P.O. Box 1388  
Flagstaff, Arizona 86002-1388

Phone: 928 380 0159

jgliege@earthlink.net

December 9, 2003

Christopher Kempley, Chief Counsel  
LEGAL DIVISION  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

Re: Pine Water Company Application for Rate Increase/ Pine Strawberry Water Improvement  
District, Intervenor Docket No. W-03512A-03-0279

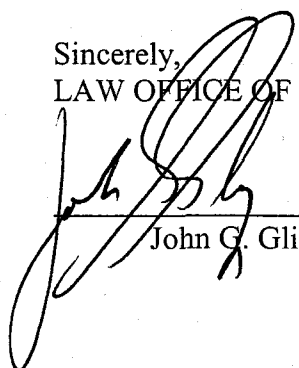
Dear Mr. Kempley:

I am writing to you at the suggestion of Jay Shapiro, the attorney for the Pine Water Company in the above captioned matter currently pending before the Arizona Corporation Commission. Enclosed is a string of emails which were exchanged between Mr. Shapiro and myself pertaining to the matter of my concern about the impact upon this proceeding of the apparent personal relationship between Mr. Black, who is Mr. Shapiro's associate and co counsel in this proceeding and the hearing officer. While I am not disparaging anyone involved in this matter, I am concerned about the integrity of the hearing process. Assuming that hearing officers are essentially judicial officers and reviewing the appropriate judicial cannons of ethics, one could argue that the relationship, which was not disclosed until I raised this issue, at a bare minimum creates an appearance which could have an impact upon how my clients, as well as the people in the Pine and Strawberry area perceive the fairness of the proceedings.

I bring this to your attention at the suggestion of Mr. Shapiro. I have not yet found evidence of a procedure in place regarding the protection of the integrity of the hearing system within the Corporation Commission in situations where former employees and aides to commissioners become a part of the adversary process and appear before the commission. Please advise if there is any process or procedure which can be followed to assure that the intervenors in this case, including the Pine Strawberry Water Improvement District, as well as the public at large are able to look at whatever result is recommended by the hearing officer as not being tainted in any fashion by this personal relationship.

Thank you for your consideration of this matter.

Sincerely,  
LAW OFFICE OF JOHN G. GLIEGE



John G. Gliege

Cc: Mr. Jay Shapiro

**John G. Gliege**

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**From:** <JSHAPIRO@FCLAW.COM>  
**To:** <jgliege@earthlink.net>  
**Sent:** Friday, December 05, 2003 8:41 AM  
**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

Given what I have read of late, I gather you are more familiar with recent ethical issues than I am. In any event, I am not pursuing my client's cause, I am defending against your frivolous assertions, as I have been since you entered this case. Taking action, which merely meant informing the ACC I deemed your action unethical, if I am required to do so, does nothing to further my client's cause. Of course, if there is some sort of ethical opinion deeming the type of behavior you are engaging in ethical, then I guess I will have no basis to claim your action is unethical. On the other hand, it appeared that way to me and I felt compelled to say so before saying so publicly.

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]  
**Sent:** Friday, December 05, 2003 8:19 AM  
**To:** SHAPIRO, JAY  
**Subject:** Re: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Shapiro, you should be aware that the ABA has previously issued an ethical opinion concerning the propriety of threatening to bring ethical action in an effort to pursue your client's cause. If you are not aware of it, I am sure the ABA can locate it for you. I will consider your message and act in the best interest of my client. John G. Gliege

----- Original Message -----

**From:** JSHAPIRO@FCLAW.COM  
**To:** jgliege@earthlink.net  
**Sent:** Friday, December 05, 2003 7:18 AM  
**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Gliege:

I must confess to now being confused. You now claim you are "not in a position to judge the conduct of others", yet this entire issue began by your judging the conduct of others (Mr. Black and Judge Nodes, to start) as improper. I am not able to reconcile this inconsistency.

Nevertheless, your latest e-mail seems to imply that your concerns are not lessened because we have not been sufficiently forthcoming. Thus, I must assume if you do choose to raise this matter with the ACC, after being told your claims are without merit, you will assert that I could have simply explained why earlier. Therefore, in a showing of good faith, and in an effort to save my client, your client and the ACC the cost and inconvenience of addressing your meritless concerns, I will endeavor herein to provide you information that should be sufficient to lessen your claims of concern.

1. Mr. Black was a lawyer in the ACC's legal division approximately five years ago, for about one year. He then served for approximately four years as Aide to Commissioner Jim Irvin. I guess you could say his former employment at the ACC is a matter of public knowledge.
2. Mr. Black completed a one year period of not appearing before the Commission, as required by state law, in April 2003
3. There was absolutely no reason to disclose Mr. Black's former ACC employment earlier because it has no bearing on the proceedings.
4. Mr. Black is not the lead lawyer in this matter, I am. No decision has been made concerning whether Mr. Black will even appear before the ACC in this matter. He merely handled the conference call with

12/6/2003

**John G. Gliege**

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**From:** <JSHAPIRO@FCLAW.COM>  
**To:** <jgliege@earthlink.net>  
**Sent:** Friday, December 05, 2003 12:31 PM  
**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

FYI—I have made Staff counsel, Messrs. Horton and Kempsey, aware of your concerns in the event that you need to speak with them about it.

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]  
**Sent:** Friday, December 05, 2003 8:19 AM  
**To:** SHAPIRO, JAY  
**Subject:** Re: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Shapiro, you should be aware that the ABA has previously issued an ethical opinion concerning the propriety of threatening to bring ethical action in an effort to pursue your client's cause. If you are not aware of it, I am sure the ABA can locate it for you. I will consider your message and act in the best interest of my client. John G. Gliege

—— Original Message ——

**From:** JSHAPIRO@FCLAW.COM  
**To:** jgliege@earthlink.net  
**Sent:** Friday, December 05, 2003 7:18 AM  
**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Gliege:

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Nevertheless, your latest e-mail seems to imply that your concerns are not lessened because we have not been sufficiently forthcoming. Thus, I must assume if you do choose to raise this matter with the ACC, after being told your claims are without merit, you will assert that I could have simply explained why earlier. Therefore, in a showing of good faith, and in an effort to save my client, your client and the ACC the cost and inconvenience of addressing your meritless concerns, I will endeavor herein to provide you information that should be sufficient to lessen your claims of concern.

1. Mr. Black was a lawyer in the ACC's legal division approximately five years ago, for about one year. He then served for approximately four years as Aide to Commissioner Jim Irvin. I guess you could say his former employment at the ACC is a matter of public knowledge.
2. Mr. Black completed a one year period of not appearing before the Commission, as required by state law, in April 2003
3. There was absolutely no reason to disclose Mr. Black's former ACC employment earlier because it has no bearing on the proceedings.
4. Mr. Black is not the lead lawyer in this matter, I am. No decision has been made concerning whether Mr. Black will even appear before the ACC in this matter. He merely handled the conference call with Judge Nodes you requested because you would not await my return from a vacation you knew I had planned. In fact, Mr. Black was not even involved in a significant capacity until the District moved to intervene and expanded the scope of the proceedings making it impossible for me to handle the matter on my own.

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5. Mr. Black informs me he does not believe he referred to Judge Nodes by his first name during the call, although he may have in prior conversations between you and him related to setting up the call.

6. The "utility bar" in this state is quite small and many of the lawyers that practice before the ACC are well known to the Commissioners and the ALJ's in the ACC's Hearing Division. I myself have referred to some of the ALJ's by first name on occasion in informal proceedings. This familiarity arises from repeated appearances in a professional capacity, not from any sort of bias. Even a cursory glance at the Commission's decisions would demonstrate no such bias, or un-level playing field exists.

7. The playing field is level. The Pine Water rate case will be decided based on an evidentiary record. Your client will have a chance to submit evidence as will Pine Water consistent with the applicable rules. In fact, you have appeared before Judge Nodes previously on matters involving Pine Water as you represented Mr. Peterson and his development company in a matter brought against them by my client.

8. If you feel you need to further discuss this matter with an objective party, I would suggest you contact Mr. Chris Kempley before bringing this matter to the level of the ACC's Hearing Division. Mr. Kempley is the Chief Counsel in the ACC's legal division and has been employed by the Commission for quite some time. Although I have not discussed this matter with Mr. Kempley such a call should go a long way to further resolving your concerns.

Finally, please be advised, should my final effort to dissuade you from pursuing this claim further fail, because I find your claim so lacking in merit, it is impossible not to conclude that this is simply another attempt by you and your client to delay needed rate relief to Pine Water Company. I further suggest such delay is part and parcel to you and your client's effort to use this proceeding as a means of attempting to depress the Company's value for purposes of your client's publicly expressed desire to condemn. I believe such continuing abuse of the Commission's process constitutes unethical behavior on your part and I will pursue such a claim accordingly.

Jay L. Shapiro

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]

**Sent:** Thursday, December 04, 2003 10:02 PM

**To:** SHAPIRO, JAY

**Subject:** Re: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Shapiro; I am not in a position to judge the conduct of others, only to raise the concerns which I have. Those concerns certainly are not less now after this extensive exchange of emails. John G. Gliege

----- Original Message -----

**From:** JSHAPIRO@FCLAW.COM

**To:** jgliege@earthlink.net

**Sent:** Thursday, December 04, 2003 8:49 PM

**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

That was a question. Shall I assume you will not answer it?

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]**To:** SHAPIRO, JAY

**Subject:** Re: Motion to Compel and issues about the familiarity with the hearing officer.

Thank you for the additional information. John G. Gliege

----- Original Message -----

**From:** JSHAPIRO@FCLAW.COM

**To:** jgliege@earthlink.net

**Sent:** Thursday, December 04, 2003 7:40 PM

12/6/2003

**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

Am I to understand it is now your position that because Mr. Black worked at the Commission your client cannot get a fair hearing from the ACC in Pine Water's rate case? I believe most of the hearing officers were at the ACC when Mr. Black was Commissioner Irvin's aide, so under your theory, should all of them withdraw as well?

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]

**Sent:** Thursday, December 04, 2003 6:55 PM

**To:** SHAPIRO, JAY

**Subject:** Re: Motion to Compel and issues about the familiarity with the hearing officer.

Thank you for this information; I believe it should have been disclosed much earlier in this proceeding; but nevertheless I will explain to the hearing officer my concerns and let he and Mr. Black achieve their own comfort level with this. John G. Gliege

**Sent:** Thursday, December 04, 2003 8:43 PM

----- Original Message -----

**From:** JSHAPIRO@FCLAW.COM

**To:** jgliege@earthlink.net

**Sent:** Thursday, December 04, 2003 9:28 AM

**Subject:** RE: Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Black previously worked for the Commission. If you have further concerns, you will need to bring them to the attention of the Commission.

-----Original Message-----

**From:** John G. Gliege [mailto:jgliege@earthlink.net]

**Sent:** Wednesday, December 03, 2003 8:52 PM

**To:** SHAPIRO, JAY

**Cc:** harry jones

**Subject:** Motion to Compel and issues about the familiarity with the hearing officer.

Mr. Shapiro:

I am in receipt of your answers to our discovery and find them to be less than responsive. The matters which I previously indicated to you are still outstanding. Therefore, please be advised that I will be filing a motion to compel discovery.

However, before doing anything further before this hearing officer I must express a concern which I have. When Mr. Black and I were speaking with him the other day I noticed that Mr. Black freely spoke in a very informal manner, calling the hearing officer by his first name and the tone and tenor of the conversation indicating an existing relationship between the hearing officer and Mr. Black. I found that this immediately raised questions in my mind as to the propriety of the hearing officer continuing in this proceeding. Evidentially there is a familiarity with the hearing officer which your associate may be relying upon to attempt to make the playing field in this instance less than level, and tipped perhaps in favor of the Pine Water Company.

Please provide me a full disclosure of the relationship between your

12/6/2003



associate, Mr. Black and the hearing officer which allows for such informal conduct, and likewise between yourself and the hearing officer reflecting the same. Please provide this disclosure no later than noon on Friday, December 5, 2003.

Following the conference call between Mr. Black and the hearing officer I was concerned about the appearances of the situation and whether or not my client could receive a fair hearing before a hearing officer who is on a first name basis during a conference such as the one we had with counsel for one party but not the other. This may reflect upon the integrity of the process and the parties perception of how fairly they are being treated. Once I receive your response to this email I will then consider what further steps to take in this matter.

Thank you in advance for your cooperation in this issue.

Sincerely,  
John G. Gliege

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12/6/2003